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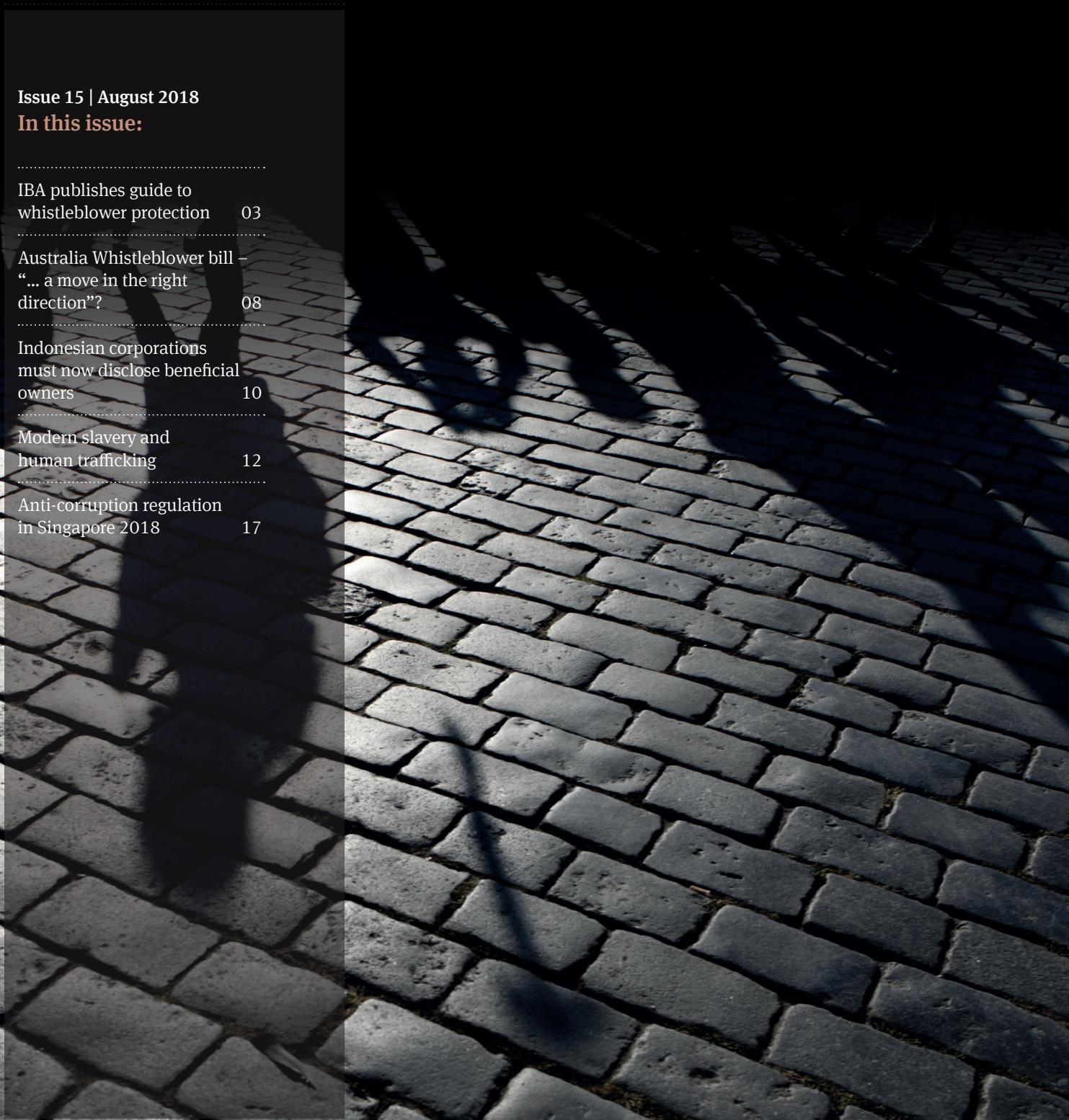
# Asia Pacific Insights

## Business ethics and anti-corruption

Issue 15 | August 2018

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## From the editor

Many thanks for reading Issue 15 of our *Business ethics and anti-corruption Asia Pacific Insights*.

With a growing trend of people coming forward to raise concerns in relation to corporate wrongdoing and workplace harassment, it is timely that the IBA issued a comprehensive guide on whistleblower protection. Mathias Goh and I summarize the salient aspects of the guide which serves as a useful resource for regulators and corporations on the development and implementation of whistleblowing channels. In a similar vein, Australia has proposed whistleblowing laws to provide protection to whistleblowers against retaliation and that require corporations to put whistleblowing policies in place. Abigail McGregor hails this as a move in the right direction.

Indonesia takes a step toward greater transparency with a regulation requiring corporations to disclose their beneficial ownership. Kresna Panggabean describes how the regulation supports ongoing efforts to prevent and eradicate crimes of money laundering and terrorism financing.

In a comparative jurisdictional analysis, we examine existing and emerging legislation in the United Kingdom, Australia, Hong Kong and Singapore on modern slavery and human trafficking. Milana Chamberlain, Abigail McGregor, Alfred Wu and I draw out the similarities and differences of the various laws and map out the challenges ahead for commercial organizations and make some practical recommendations.

Finally, Jeremy Lua and I provide a comprehensive overview of the anti-corruption regime in Singapore and share our thoughts on some updates and trends.

I hope you will find our articles in this Issue 15 informative and helpful!



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# IBA publishes guide to whistleblower protection

## Introduction

While whistleblowing is not a new phenomenon, it appears to have taken on added significance in recent years. Fundamentally, it remains the case that whistleblowers can reveal information that would otherwise go undetected, and are therefore a vital source of intelligence. Such information can often be critical to an organization, ensuring it, among others, operates according to the law and to an appropriate standard, and protects the health and safety of its employees.

In recent years, numerous jurisdictions have recognized the increasing importance of protecting whistleblowers and have introduced legislation to do so. However, there remain many jurisdictions that afford little or no protection to whistleblowers which lead to a culture of distrust and retaliation. Moreover, even in countries that do afford legal protections to whistleblowers, there remain large gaps in the scope and application of the law that adversely limit their effective operation.

Against this backdrop, the International Bar Association's (IBA) Legal Practice Division and Legal Policy and Research Unit commissioned a Working Group sometime in late 2016 to come up with guidance for regulators and organizations on the development and implementation of whistleblower protections. The writers of this article were both part of the Working Group, which also comprised practitioners based in United Kingdom, United States, France, Italy, Czech Republic, Netherlands and Bolivia.

The Working Group concluded its work recently, and produced a guide (Guide)<sup>1</sup> which addresses these limitations, identifies the fundamental principles underpinning effective whistleblower regulations, and highlights the important role played by governments and organizations in protecting whistleblowers. The Guide provides commentary and offers guidance to: (a) jurisdictions on the elements necessary to develop and improve legislative frameworks on whistleblower protection to make them more comprehensive, effective and robust; and (b) organizations on the elements relevant to developing and implementing whistleblower protection policies and procedures.

## What is whistleblowing?

Whistleblowing may be defined as the making of certain disclosures of actual or potential (or "reasonably anticipated") conduct that an individual reasonably believes to be unlawful. These disclosures can take place internally via a dedicated and clearly communicated reporting mechanism or externally to appropriate authorities.

The Guide concluded after some research that many jurisdictions do not have a specific definition of "whistleblower". The Guide recognized the importance of whistleblowing

frameworks to identify clearly the persons who can avail themselves of protections in the event that they choose to report misconduct or wrongdoing. In the context of legislation, laws should clearly describe the persons to whom the protections afforded under the law would apply. Such protections generally apply to persons who are "employees" or "workers" in a workplace, including contractors, consultants, interns and volunteers. For multinational companies, protections should be extended to foreign or expatriate workers.

## Why do whistleblowers need protection?

It is not uncommon to hear accounts of employees who experience negative repercussions after having raised concerns of misconduct within an organization (often honestly and in the course of one's job duties). These adverse repercussions often take the form of victimization, ostracism by peers, demotion, retaliation, discrimination, reprisals and/or dismissal. Outside of the workplace, a whistleblower may find himself exposed to defamation proceedings or criminal prosecution after the act of whistleblowing. For example, in *Aghimien v Fox* Case No 71A03-1602-CT-291 (Indiana Court of Appeals), the plaintiff whistleblower exposed two university professors of academic plagiarism. One academic was found to have plagiarized, while the other as co-author, was not. Cleared of plagiarism,

<sup>1</sup> A copy of this guide can be located at <https://www.ibanet.org/Conferences/whistleblowing.aspx>. This article sets out a summary of the commentaries and findings in the Guide.

the co-author brought a defamation suit against the whistleblower.

Fear of these adverse repercussions can understandably amount to a significant disincentive to whistleblowers, and place a chilling effect on individuals seeking to provide information of wrongdoing.

## Current state of whistleblower protections around the world

The Working Group observed that whistleblower protection laws differ greatly across jurisdictions. For example, the US has an established history of whistleblower protection laws. Some of these laws are well known, such as the Dodd–Frank Act and Sarbanes–Oxley Act. In Europe, the whistleblower protection laws in most European countries are not as developed as those in the US. However, the EU Commission has recently enacted a new whistleblowing directive and that is set to be a significant breakthrough in this area (we explain more on this below).

Most jurisdictions have specific and targeted whistleblower protections in the context of certain statutes. In Singapore, for example, whistleblowers are afforded anonymity when making disclosures required by the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (Cap 65A). However, jurisdictions such as the Netherlands and Australia have standalone whistleblowing laws which provide for whistleblower protections.

## What type of conduct should whistleblower protections cover?

One of the thornier issues the Working Group had to consider was the type of misconduct which should properly be covered by whistleblowing protection laws, whether in the private or

public contexts. Some considered that whistleblower protections ought only to apply to reports concerning breaches of the law. Others preferred a more expansive approach, specifically to grant protections to persons who report on activities which have not yet amounted to breaches of the law. A further consideration was whether these whistleblower protections should extend to those who report matters that constitute more of ethical or moral concerns.

On balance, the Working Group recommends that laws to protect whistleblowers should be limited in scope to reports of conduct that an individual reasonably believes to be actually or potentially unlawful. There are concerns that extending protections to include ethical or moral issues, which can mean different things to different people, can potentially give rise to subjectivity and uncertainties as to the scope of the protections. However, organizations are at liberty (and, in fact, encouraged) to provide broader internal protections in the context of their workplace, for example by encouraging its employees to report violations of internal policies or conduct that is unethical, immoral or contrary to the values of that organization.

## Tension between an employee's duty of loyalty to employer and requirement to report wrongdoing

The Working Group recognized that in some instances, there may be a tension between the duties of loyalty and fidelity owed by an employee to his or her employer, and a requirement to report wrongdoing. The duties of loyalty and fidelity (which often arises out of contract or at general law) may prevent an employee from disclosing information about the organization to third parties, even if that information pertains to misconduct or wrongdoing.

The Working Group observed that some jurisdictions, most notably the US, have laws which makes it unlawful for private companies to put in place reprisals against employees for acts of whistleblowing. For example, an oil-and-gas company, SandRidge Energy Inc, agreed to pay to the U.S. Securities and Exchange Commission a US\$1.4 million penalty for retaliating (firing) an employee who had raised concerns inside the company about how it calculated its publicly reported oil-and-gas reserves.

The Working Group took the view that such an approach was to be welcomed, and that organizations should be discouraged from including provisions into employees' contracts of employment that prohibit them from raising concerns of misconduct or wrongdoing with relevant authorities. Such provisions are essentially used to protect individuals within an organization rather than protecting the organization and its *raison d'être*. Jurisdictions are therefore encouraged to enact laws which discourage organizations from restricting their employees' ability to expose misconduct or wrongdoing by inserting such "gag clauses" in their employment contracts or separation agreements.

## Should individuals be under a positive obligation to report suspected misconduct or wrongdoing to the authorities?

The Working Group was of the view that imposing a positive statutory obligation on individuals to report suspected or actual misconduct or wrongdoing has its risks. While it is likely to result in valuable information being provided to authorities, it may also put those individuals who report it in danger, particularly if the protections in place are inadequate.

If a jurisdiction were to enact laws that oblige individuals to bring actual or suspected misconduct or wrongdoing to the attention of authorities, such individuals ought to be entitled to the most robust form of protection available in the jurisdiction.

### To whom should misconduct or wrongdoing be reported or communicated?

In the context of regulatory authorities, a jurisdiction's laws and regulations typically stipulate the contact person or department that such misconduct or wrongdoing can be reported to.

In the context of private organizations, the question then becomes: who is best placed to be the recipient of such potential disclosures? Failing to address this question carefully might deter individuals from making reports on misconduct or wrongdoing. The Working Group suggested that the person responsible for whistleblower protection be an independent member of the senior management team who reports regularly to the board or a committee (e.g., risk management committee) of the board.

Organizations may also consider implementing anonymous whistleblowing hotlines, which may be a more appropriate alternative channel where employees have information that potentially implicates members of the senior management team or board members.

### Should a whistleblower be allowed to rely on the whistleblowing protections only if he or she made the report in good faith?

The Working Group observed that laws in certain jurisdictions such as in New Zealand include a requirement that a person reporting misconduct can only avail themselves of protection if

they have made such their disclosures in good faith. Such a requirement of good faith is typically met if the person reasonably believes that the information they are reporting is true. Some jurisdictions appear to add a further gloss to this requirement, requiring that the informant must be seized of pure altruistic motives when making the report, failing which he or she cannot rely on the protections even if the information set out in the report were true.

Given that there is often ambiguity behind the term "good faith" (particularly when legislation fails to define such a term and leave the task of interpretation to the courts), this requirement can have a stifling effect as potential informants are uncertain whether they can avail themselves of these protections. As such, it was the Working Group's preference for whistleblower protection frameworks to drop such a requirement of "good faith".

### Should all reporting be anonymous?

The Working Group recognized that anonymous reporting is often the only way information on a particular situation can be obtained. Anonymity is particularly important where there are risks to a person's safety after having reported wrongdoing. However, there is a recognition that anonymous reporting can make it difficult to obtain follow-up information that might be essential to conduct a more thorough investigation. There are also concerns that if reports can be made anonymously, individuals might abuse these reporting channels and bring false or vindictive allegations against other persons.

As an added consideration, anonymous reporting may also have implications under data protection laws in some countries. This is dealt with further in the next section below.

## Impact of data protection laws on whistleblowing protections

Data protection laws in some countries may impose legal restrictions on internal private sector whistleblowing procedures. Consider, for example, the EU's General Data Protection Regulation (GDPR). The principle underpinning the GDPR is that personal data should be collected and used fairly. As company whistleblower reporting mechanisms rely on the processing of personal data – both of the reporting person and the subject of the report – the establishment of such reporting mechanisms by companies headquartered or operating in Europe (and potentially those outside the EU) will be subject to this strengthened data protection framework.

If companies' internal reporting mechanisms and subsequent internal investigation procedures violate GDPR provisions on data processing, data subjects' rights (ie, the subject of the whistleblower report) or transfer personal data to third countries or international organizations, companies could be liable to pay hefty administrative fines (for example, up to four per cent of total worldwide annual turnover). This could be a significant deterrent for companies considering whether to implement protected internal reporting channels, whether or not they are in the EU. Organizations may therefore have to acquire an understanding of the relevant data protection regulations in order to implement robust and effective whistleblowing protection frameworks.

### Compensation and leniency programmes for whistleblowers

The Working Group recognized that whistleblowers sometimes suffer detrimental actions following exposure of wrongdoing or misconduct. This is

arguably most prevalent in the context of the workplace, where whistleblowers may face termination or constructive dismissal following their exposure of wrongdoing in their organizations.

Obviously, the termination of employment in such circumstances will be optically structured as unrelated to the acts of whistleblowing. Some jurisdictions (e.g. Australia, Canada, South Africa, South Korea and the US) have legislation which provides for compensation for reporting persons in the public sector who have suffered adverse actions as a result of whistleblowing activities, such adverse actions including a termination of employment.

Where compensation is provided, the question of compensation is usually addressed by reference to the unlawfulness of the termination of the whistleblower's employment. These compensation frameworks do not usually take into account any pain, suffering and harassment which the whistleblower may have encountered as a result of the whistleblowing activities.

The Working Group proposed that whistleblower protection frameworks should include a system of compensation administered by an independent statutory office-holder, court system or quasi-judicial administrative process, and through which both parties provide information related to the assessment of economic and emotional damages. Leniency programmes (such as total immunity or partial reduction from prosecution or penalties) can act as a strong incentive for whistleblowing. However, it appears that the whistleblowing laws of most jurisdictions do not currently include any leniency programmes. The Working Group suggested that legislators should consider including such programmes to encourage whistleblower to come forward with information.

## How should organizations go about implementing a robust whistleblowing protection framework?

The Working Group observed that organizations typically adopt and implement whistleblowing frameworks only when they are the subject of investigations or legal proceedings. In this sense, coming up with a whistleblowing framework is largely a reactive measure, and when implemented in such circumstances, the framework is often put together quickly on a piece-meal basis and may not be ideal.

Rather, organizations should take time to consider some of the following questions when looking to implement a robust whistleblower protection framework (more questions are found at page 36 of the Guide)

- What is the nature of information that the organization wants brought to its attention?
- How should the reporting procedures work in the structure of the organization?
- Does the framework specify appropriate external recipients of concerns if a whistleblower is not satisfied with the internal response?
- How can they ensure information of the reporting person and the person who is the subject of the report is confidential and protected?
- How does the organization provide feedback to a whistleblower about their concerns? Does the organization make the results transparent?

- How can the organization help to promote a workplace culture that encourages and protects disclosures of possible misconduct?

- What process is followed to investigate any reports of misconduct or wrongdoing?

The Working Group recognized that one of the driving factors behind a successful whistleblowing protection framework is a jurisdiction's cultural perception towards whistleblowing activities. This is not something that can change easily with the mere enactment of laws. For example, in some cultures, there is a deep suspicion of whistleblowers, and acts of "snitching" or "tattle-taling" may be frowned upon whether at home, in the schoolyard or in the workplace. The Working Group believes that education programmes which iterate the importance of reporting concerns of misconduct and wrongdoing, and protecting the rights of those who do so, are likely to be an important tool if cultural attitudes and perception are to change.

## Developments around the globe

In Europe, what lies on the horizon is a new whistleblowing directive proposed by the EU Commission in late April 2018. The directive is intended to improve and harmonize the protection of whistleblowers in the private and public sector across Europe. It is expected to be implemented by national legislators by May 2021. This directive will apply to companies in the private sector with either at least 50 employees or an annual turnover of at least €10 million. It will also apply to companies involved in financial services or vulnerable to money laundering/terrorist financing.

will be affected regardless of their size or turnover. Under the provisions of the directive, these organizations are required to set up an internal confidential reporting channel, and only a selected, well-trained employees will be allowed to handle the reports. As for whistleblower protections, whistleblowers will have the right to be protected against retaliation, such as dismissal, written warning or transfer by the company.

In Australia, a new standalone whistleblowing statute is in the final throes of parliamentary approval. The legislation requires public companies and large private companies which do not have existing internal whistleblower policies to set up new policies, while those that do are required to review and update them to ensure compliance with the new legislation.

The legislation also proposes new statutory protections for whistleblowers in relation to consumer credit laws and taxation, and expands the current protections to take into account disclosures concerning corporate corruption, bribery, fraud, money laundering, terrorist financing or other serious misconduct. Companies will be subject to penalties for failing to set up a compliant whistleblower policy, and both individuals and companies may be subject to substantial civil and criminal penalties for breaching a whistleblower's anonymity and for victimizing or threatening to victimize a whistleblower. It is also interesting to note that the legislation has expressly done away with a "good faith" requirement for disclosures, allowing anonymous disclosures and providing immunities to whistleblowers regarding the type of disclosures made.

## Concluding remarks

In the majority of jurisdictions surveyed, it would appear that the laws relating to whistleblower protections are ripe for change. This topic is not one that is easy to navigate. From the perspective of legislators, the level and forms of whistleblower protection in any legislation will have to take into account the prevailing socio-cultural objectives and norms. From the perspective of individual organizations, each organization will have to exercise care in coming up with an internal whistleblowing framework which is practical, effective and accessible to its employees.

The Guide does not attempt to provide answers to all these questions. Rather, it is intended to ventilate and provide guidance to help stakeholders address these difficult questions. In that context, we hope that the Guide will be a useful resource for governmental authorities and commercial organizations.

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# Australia Whistleblower bill – “... a move in the right direction”?

## Introduction

The Australian Government's proposed whistleblowing<sup>1</sup> laws are one step closer to becoming reality, with the Senate Economics Legislation Committee (the Committee) recommending that the Treasury Laws Amendment (Whistleblowers) Bill 2017 (the Bill) be passed,<sup>2</sup> despite numerous stakeholders expressing concern about aspects of the Bill.<sup>3</sup> In acknowledging stakeholder concerns, the Committee has recommended that the Bill explicitly provide for review of its provisions. The Committee considers this will ensure that recommendations of the Parliamentary Joint Committee on Corporations and Financial Services (PJC) that have not been implemented<sup>4</sup> in the Bill will remain under active consideration. Unfortunately, the commitment to review the legislation may only result in more uncertainty for business, as they undergo the culture shift required to implement the new

regime, while keeping one eye on the horizon for further changes.

The only other amendment that appears likely to be made to the Bill is to clarify that a journalist (who can be the recipient of an emergency disclosure) will include public broadcasters.

As noted in the Committee's Report, key recommendations that have not been implemented are development of a single private sector Act, the introduction of a rewards scheme for whistleblowers, and the establishment of an independent Whistleblower Protection Authority. The Report notes that the government is considering all the recommendations of the PJC.

## What next?

It appears that the Bill will come under scrutiny in its legislative passage, with the Labor Senators noting they will continue to consult with stakeholders on the Bill, and calling on the Government to release its response to the PJC report as soon as possible. Senator Patrick (NXT) provided a dissenting report, and stated that “perfect is the enemy of good, but this ain't even good”. The Greens have also expressed concerns that the Bill did not go far enough.

<sup>1</sup> Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 see: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s1120](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1120).

<sup>2</sup> The Senate Economics Legislation Committee report states that “On balance, the committee is satisfied that the bill is a move in the right direction and will be a valuable contribution to whistleblower protection.” (at 3.86).

<sup>3</sup> New whistleblower protection laws hit parliament in Australia see: <http://www.nortonrosefulbright.com/knowledge/publications/158696/new-whistleblower-protection-laws-hit-parliament-in-australia>.

<sup>4</sup> As noted in the Committee's Report, key recommendations that have not been implemented are development of a single private sector Act, the introduction of a rewards scheme for whistleblowers, and the establishment of an independent Whistleblower Protection Authority. The Report notes that the government is considering all the recommendations of the PJC.

## What does this mean for business?

As it looks increasingly likely that the Bill will eventually be passed, companies<sup>5</sup> that do not have whistleblower policies will need to start work on developing a compliance plan, and companies with existing policies will need to review and update them to ensure they comply with the new provisions.

The protections in the Bill apply to a broader scope of disclosures, and employees will be able to make protected disclosures much further down the hierarchy to their immediate supervisor or line manager. The Committee noted the difficulties this may create but felt that companies would develop ways of handling this, such as designating more senior managers as the reference point for disclosures. Complaints may also be able to be made by non-employees, such as contractors, suppliers and family members.

Companies will be subject to penalties for failing to set up a compliant whistleblower policy, and both individuals and companies may be subject to substantial civil and criminal penalties for breaching a whistleblower's anonymity and for victimizing or threatening to victimize a whistleblower. However, a company will not be vicariously liable for the acts of its

<sup>5</sup> This will apply to public companies, large proprietary companies and companies that are trustees of superannuation entities.

employees, if it can establish it took reasonable steps and exercised due diligence to avoid the victimizing conduct.

Therefore, a simple tick the box policy will not be enough to ensure compliance with this legislation, or to establish that an employer has exercised due diligence to avoid the victimizing conduct. Companies will need to ensure they implement training at all levels of their organization, to enable supervisors and managers to recognize a whistleblower complaint and deal with them appropriately, and implement systems to closely monitor the understanding and application of their policy and procedures.

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# Indonesian corporations must now disclose beneficial owners

## Introduction

Indonesia's President Joko Widodo recently issued a regulation requiring corporations to disclose information on their beneficial owners (Presidential Regulation No. 13 of 2018 or Regulation 13). This regulation supports ongoing efforts to prevent and eradicate crimes of money laundering and terrorism financing, and also complies with Indonesia's commitments under the international agreement on Automatic Exchange of Information (AEOI). The regulation came into effect on March 1, 2018.

This is not the first time corporations in Indonesia have been required to disclose information on their beneficial owners. This obligation already applies to corporations in certain business sectors, including banks and insurance companies, which are regulated by Indonesia's Financial Services Authority (Otoritas Jasa Keuangan or OJK). The OJK requires all financial institutions to disclose information on their ultimate parent and other controllers. Regulation 13 now imposes this requirement on all types of corporation in Indonesia.

## Scope and definitions

Regulation 13 defines a corporation as any organized group of people or assets, whether or not established as a legal entity, including

- Limited liability company
- Foundation
- Association
- Cooperative
- Partnership
- Other form of corporation (not defined)

A corporation is required to report information on its beneficial owners, including any individual who

- Can exercise their power to appoint and dismiss the directors, commissioners, managers, trustees, or supervisors.
- Controls the corporation and receives or is entitled to receive direct or indirect benefits from the corporation.
- Is the true owner of the corporation's assets or share capital.

Some additional criteria apply specifically to limited liability companies when determining their beneficial owners

- Ownership of at least 25 percent of the shares in the company, as set out in the articles of association.
- Ownership of more than 25 percent of the voting rights in the company, as set out in the articles of association.
- Being entitled to more than 25 percent of the annual profits of the company.

Since there is no distinction between corporations with domestic and foreign investment, foreign investment (PMA) companies are also subject to Regulation 13.

Corporations must report and disclose information on their beneficial owners to "authorized institutions", which Regulation 13 defines as any government body (central or local) with authority over the registration, legalisation, approval, licensing and dissolution of corporations, and any authority charged with monitoring and regulating the corporation's business.

## Reporting obligations

When a corporation makes a new application for establishment, approval or licensing, and following any change in its beneficial ownership, it is required to

- Designate at least one party as its beneficial owner.
- Appoint an employee to be responsible for implementing the principles set out in Regulation 13 and to provide relevant information on the beneficial owner of the corporation to authorized institutions, upon request.
- Report to authorized institutions on the beneficial ownership of the corporation, and inform them of any changes.

Regulation 13 does not specify what sanctions can be imposed on corporations for failure to comply. However, sanctions may be imposed under “applicable laws and regulations” for failure to report or disclose the beneficial owners when requested to provide such information.

## Date of effectiveness

Existing corporations that have already obtained or are currently applying to authorized institutions for registration, legalisation, approvals, permits or licenses had until March 5, 2018 to comply with Regulation 13.

The Indonesian Government announced in local newspapers on March 28, 2018 that it is now preparing the implementing regulations for these new rules, which are expected to be issued within a year.

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# Modern slavery and human trafficking

A comparative analysis of existing and emerging legislation in the United Kingdom, Australia, Hong Kong and Singapore.

## Executive summary

In 2015, the United Kingdom passed the Modern Slavery Act, which contains a corporate reporting requirement aimed at increasing transparency around modern slavery and human trafficking in the operations and supply chains of large companies. Two years later, the governments of Australia and Hong Kong have announced their intention to introduce similar modern slavery reporting requirements, which largely mirror the UK Modern Slavery Act, but, arguably, go even further. This has raised the question of how corporates with operations or suppliers in the Asia Pacific region including Australia, Hong Kong and neighboring Singapore, will be affected.

In light of these recent developments, we have set out

- A snapshot of the current landscape in Australia, Hong Kong and Singapore.
- A comparative analysis of the current and proposed modern slavery legislation in the United Kingdom, Australia, Hong Kong and Singapore.
- A summary of the challenges that corporate reporting provisions in modern slavery legislation have posed for corporates.

- Recommendations on overcoming these challenges.

## Current landscape in Australia, Hong Kong and Singapore

There is no modern slavery legislation currently in force in Australia,<sup>1</sup> Hong Kong or Singapore which specifically targets companies. However, a series of controversies concerning the use of forced labor<sup>2</sup>, the findings of a 2013 Parliamentary Inquiry into slavery, and other international trends, such as the introduction of the UK Modern Slavery Act 2015 (the UK Act) spurred the Australian government to undertake a Parliamentary Inquiry to investigate the possibility of establishing modern

slavery legislation similar to the UK Act.<sup>3</sup> Six months after the establishment of the Parliamentary Inquiry, the Federal Attorney-General's Department began a lengthy consultation process into a proposed reporting requirement in relation to modern slavery in supply chains.<sup>4</sup> Following the release of the Parliamentary Inquiry's final report on modern slavery, *Hidden in Plain Sight* (the Parliamentary Inquiry Report),<sup>5</sup> in February 2018, the Assistant Minister for Home Affairs, Alex Hawke MP, announced that a Modern Slavery Bill will be introduced in the Australian Parliament in the first half of 2018. Almost immediately after this, a Modern Slavery Bill was introduced in the Upper House of the New South Wales (NSW) Parliament by Christian Democrats MLC Paul Green (the NSW Bill) as a private

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<sup>1</sup> Although there is no Australian federal law on modern slavery, New South Wales passed the Modern Slavery Act on June 21, 2018.

<sup>2</sup> The findings of the Trafficking in Persons Report suggest that while traditionally the majority of human trafficking and slavery investigated in Australia have related to women subjected to sexual exploitation, there has been an increase in the number of referrals and investigations relating to other forms of labor exploitation especially in the agriculture, construction, hospitality and domestic services industry – and is now comparable with those subjected to sexual exploitation. See Australian Government “Trafficking in persons: the Australian Government Response July 1, 2015 – June 30, 2016” The Eighth Report of the Interdepartmental Committee on human trafficking and slavery (2016) p 23 <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Report-of-the-interdepartmental-committee-on-human-trafficking-and-slavery-july-2015-to-June-2016.pdf>. See also: <http://www.nortonrosefulbright.com/knowledge/publications/157741/food-for-thought-the-modern-slavery-acts-impact-in-fresh-food-retail-wholesale-and-agriculture>.

<sup>3</sup> On February 15, 2017 the Attorney General referred an inquiry to the Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade to investigate establishing a Modern Slavery Act in Australia [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery).

<sup>4</sup> On August 16, 2017, the Minister for Justice released a consultation paper on the Australian Government's proposed model for a Modern Slavery in Supply Chains Reporting Requirement see: <https://www.ag.gov.au/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirement-public-consultation.aspx>.

<sup>5</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Hidden in Plain Sight* (2017). See also: <http://www.nortonrosefulbright.com/knowledge/publications/158694/parliamentary-inquiries-report-into-establishing-a-modern-slavery-act-tabled-in-parliament>.

member's bill.<sup>6</sup> The NSW Bill was eventually passed on June 21, 2018.

Similar concerns regarding the lack of a proper legislative framework addressing modern slavery and human trafficking have been raised in Hong Kong. In this respect, Hong Kong is seen to be lagging behind its neighbors – Macau having approved an anti-human trafficking law in 2008 and mainland China having implemented steps to combat human trafficking under its 2013–2020 National Action Plan. On this basis, an anti-human trafficking concern group comprising NGOs and legal professionals has been urging the HKSAR government to take immediate steps to criminalize human trafficking in all forms. In response, Legislative Councillor Dennis Kwok, who represents the legal sector, recently presented a Modern Slavery Bill (the Hong Kong Bill) to the Chief Executive for consideration. The Hong Kong Bill is largely based on the UK Act with some modifications. The most notable of these is the inclusion of a civil cause of action against persons who have engaged in or knowingly benefited from human trafficking. If passed, this is likely to have a serious effect on how businesses address human rights issues in their operations and supply chains.

The main legislation targeting modern slavery in Singapore is the Prevention of Human Trafficking Act 2014 (PHTA). The PHTA criminalizes forced labor, and sex and labor trafficking. However, unlike the UK Act or the proposed legislation in Australia or Hong Kong, the PHTA does not contain a reporting requirement for corporates.

It therefore remains to be seen whether Singapore will follow suit and present its own modern slavery bill as a response to the building international pressure.

<sup>6</sup> Modern Slavery Bill 2018 (NSW) introduced in the NSW Legislative Council on March 8, 2018 see <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3488>.

## Comparative analysis of the current and proposed modern slavery legislation

### UK Modern Slavery Act 2015

Section 54 of the UK Act requires commercial organizations with a turnover of £36 million or more, which carry on part of their business in the UK to prepare a statement, outlining the steps they are taking to combat slavery and human trafficking in their own operations and their supply chains. The UK Act is supplemented by government guidance, which also encourages businesses not caught by the provision to report voluntarily. Although the government has been careful not to prescribe what an appropriate response to modern slavery looks like, it has stipulated that the modern slavery statement must set out the steps the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in its business or supply chains, or that it is taking no such steps. It has also specified that organizations "should aim" to include information on the following in their statements

- The organization's structure, its business and its supply chains.
- Its policies in relation to slavery and human trafficking.
- Its due diligence processes in relation to slavery and human trafficking in its business and supply chains.
- The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.
- Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate.

- The training and capacity building about slavery and human trafficking available to its staff.

The UK government has not clarified how enforcement of this provision would work, save that the Secretary of State can apply for an injunction to compel a company to publish a statement. According to the guidance, the principal enforcement mechanism will be the pressure applied by consumers, investors and NGOs where an organization is perceived to have taken insufficient steps. The guidance states that the provision aims to create "a race to the top by encouraging businesses to be transparent about what they are doing, thus increasing competition to drive up standards". This has catalyzed a flurry of activity from corporates (implementing measures to tackle modern slavery and human trafficking to include in their statements) and NGOs (scrutinising corporates' efforts). For example, various reports have been published commenting on the standard of modern slavery statements.

### Australian Reporting Model 2018

At this stage, there is some uncertainty surrounding the Australian Reporting Model due to the divergence between the recommendations in the Parliamentary Inquiry Report, the NSW Bill and the model proposed by the Attorney-General's Department's public consultation paper in August 2017 (the Government's Consultation Model).

Despite the uncertainty, it is anticipated that the Australian Reporting Model will be broadly similar to that required by the UK Act, but with some important differences. The Australian Reporting Model will likely impose a reporting requirement on organizations with an annual turnover of at least A\$0 up to 100 million (approximately £28–£56 million). The exact turnover is yet to be announced. As with the UK Act, there will be provisions for corporates

that do not meet the annual turnover requirement to opt into reporting.

The current Australian Model differs from the UK Act in three crucial ways.

#### Mandatory criteria

First, the Australian Model is likely to make it mandatory for organizations to publish modern slavery statements that, as a minimum, include a set of criteria in relation to their operations and supply chains. The exact criteria are yet to be announced, but are expected to be similar, in substance, to the non-mandatory criteria in the UK.

#### Public repository

Secondly, the Australian Model will likely include a free, publicly accessible central repository that will contain all the modern slavery statements published in compliance with the Australian Reporting Model. This will make it easier for the public and NGOs to compare how different corporates are meeting their reporting requirements (if at all). In comparison, the UK Act does not provide for such a repository. Under the UK Act, organizations are required to publish their modern slavery statement on their website or to provide a copy of the modern slavery statement to anyone who requests it, if the organization does not have a website. The Business and Human Rights Resources Centre has voluntarily set up a central repository for modern slavery statements in the UK but this is not formally monitored by the government.

#### Punitive measures

Thirdly, there is a risk that there will be penalties for corporates that do not comply with the reporting requirements. The introduction of penalties from the second reporting year onwards was recommended in the Parliamentary Inquiry Report.<sup>7</sup> The

NSW Bill goes even further by setting out penalties for failure to report as well as for publishing information that is false or misleading in a modern slavery report.<sup>8</sup> The Government's Consultation Model steered clear from penalties, expressing the view that corporates that do not comply with the reporting requirement "may be subject to public criticism."

#### Hong Kong Bill 2017

The Hong Kong Bill also contains a corporate reporting obligation under section 189, which is nearly identical to section 54 of the UK Act. However, the Hong Kong Bill goes much further than the UK Act (or the Australian Bill) in that section 169 provides claimants with a civil cause of action in tort against any person (individual or company) who has: (a) committed one of the offences under the Hong Kong Bill against them; or (b) knowingly benefited, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of the Hong Kong Bill. This section is derived from §1595 of 18 US Code Chapter 77 (Peonage, Slavery, and Trafficking in Persons).

Interestingly, although section 169(a) is designed for claimants who have themselves suffered at the hands of human traffickers, section 169(b), as drafted, does not currently specify what sort of claimant will be given standing, begging the question of whether, for example, an NGO can bring an action under section 169(b) unilaterally. Moreover, it remains open whether section 169(b) could extend liability to defendants who, for example, benefit financially from their subsidiaries' operations, but would not otherwise owe a duty of care to victims. This is particularly an issue for larger

companies, which may be deemed to have the requisite "knowledge" under section 169(b) by virtue of carrying out due diligence in preparation for meeting their reporting obligations under section 189.

Although section 169 does not expressly stipulate the types of damages which victims of slavery and human trafficking can seek, in light of the application of the equivalent provision in the US, it is expected that civil damages under section 169 could cover both pecuniary and non-pecuniary loss such as emotional harm, pain and suffering, inconvenience, and mental anguish. Punitive damages may also be awarded to punish the defendants and deter future illegal conduct.

#### Singapore Prevention of Human Trafficking Act 2014

As stated above, the PHTA does not contain any reporting requirements for corporates. However, Singapore-incorporated companies are not completely immune from providing modern slavery statements as the UK Act also imposes a reporting requirement on foreign corporates that operate in the UK. Many Singapore-incorporated companies have therefore published modern slavery statements in accordance with the requirements of the UK Act even though Singapore law does not require them to do so.

In the future, it is likely that a greater number of Singapore corporates will have to publish modern slavery statements as a result of having operations in Hong Kong or Australia. The legislation in the UK and the proposed scheme in Australia and Hong Kong place an emphasis on a corporate's global supply chain. This will certainly include many Singapore-incorporated organizations.

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<sup>7</sup> See Recommendation 5.171 of the Parliamentary Report, *Hidden in Plain Sight* (December 2017). Additionally, the Inquiry recommends the phasing in of penalties after three years for companies who fail to "adequately report", see Recommendation 5.174.

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<sup>8</sup> The penalties proposed in the NSW Bill are over A\$1 million for failure to report, failure to publish the report, or publishing misleading or false information in a report see NSW Bill ss 22(2), (6), (7).

In addition, Singapore is located in the Asia Pacific region which accounts for more than half of the total number of victims of forced labor worldwide. Corporates, who are subject to the reporting requirements in other jurisdictions may therefore put pressure on the Singapore-incorporated organizations within their supply chain to issue modern slavery statements.

Although the Singapore PHTA criminalizes the use of forced labor and the participation in human trafficking, no Singapore-incorporated company has been convicted under the PHTA. This begs the question of whether, in light of the developments in Australia and Hong Kong and pressure from stakeholders, Singapore will be next to adopt modern slavery legislation aimed at corporates.

## Challenges for commercial organizations

The heightened focus on corporate transparency in relation to modern slavery and human trafficking has posed certain challenges for corporates – particularly those with sprawling global supply chains. According to a research project<sup>9</sup> conducted by Norton Rose Fulbright in collaboration with the British Institute of International and Comparative Law (BIICL), the prevalent challenges for corporates include

- Determining “how far is far enough” when engaging in supply chain due diligence.
- Obtaining accurate and complete information on third parties or country-specific human rights risks.
- Securing internal buy-in to change the company’s focus from business risks to impacts for rights holders.

- Managing responsibility for impacts caused by third parties.

## Recommendations for commercial organizations

Companies preparing to report under modern slavery legislation should take the time to consider how they can incorporate their reporting obligations into their wider strategy for addressing human rights issues arising from their business or supply chains. This will involve

- Mapping the business and supply chains.
- Addressing slavery and human trafficking in the company’s code of conduct and obtaining input from senior management and external experts.
- Setting up an internal governance structure on modern slavery and human rights at both the operational and leadership levels.
- Including modern slavery provisions in supplier contracts, and requiring suppliers to do the same with their subcontractors.
- Conducting specific modern slavery risk assessments across the company’s own operations and suppliers.
- Disclosing any risks identified, detailing mitigation plans and demonstrating that these findings inform a company’s business decisions.
- Providing tailored modern slavery training to employees and suppliers.

- Listing bespoke key performance indicators with which the company measures its effectiveness in ensuring that slavery and human trafficking is not taking place within its business or supply chain.

While modern slavery laws are not yet in force in Australia, Singapore or Hong Kong, preparations to comply with these laws are strongly recommended, especially for corporates that have complex supply chains, or which may operate in high risk industries. Furthermore, even if a company is not directly obliged to comply with these reporting laws, the indirect application of these laws cannot be ignored. If a company were to supply to corporates which are obliged to report, it is likely that the supplier company will nonetheless be required by the corporates to disclose its modern slavery risks and take action. Therefore, it is critical to have a keen understanding of the risks involved so as to be ready for these impending laws.

<sup>9</sup> See <http://human-rights-due-diligence.nortonrosefulbright.online/>.

Norton Rose Fulbright worked closely with the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into a Modern Slavery Act providing regular pro bono assistance and participating in the public hearing held in Sydney on June 23, 2017.<sup>10</sup> Norton Rose Fulbright also has been actively participating in the Attorney-General's Department national consultation process to refine the Government's proposed Modern Slavery in Supply Chains Reporting model.<sup>11</sup>

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<sup>10</sup> The submission is available for download at <http://www.aph.gov.au/DocumentStore.ashx?id=b07d5399-4925-474d-9370-04a002977a64&subId=510714>.

<sup>11</sup> The submission to the public consultation is available at <https://www.ag.gov.au/Consultations/Documents/modern-slavery-in-supply-chains-reporting-requirement/Norton-rose-fulbright.pdf>.

# Anti-corruption regulation in Singapore 2018

## 01 | International anti-corruption conventions

### To which international anti-corruption conventions is your country a signatory?

Singapore became a signatory to the United Nations Convention against Corruption on November 11, 2005 (ratified on November 6, 2009) and to the United Nations Convention against Transnational Organized Crime on December 13, 2000 (ratified on August 28, 2007).

Singapore has been a member of the Financial Action Task Force since 1992, was one of the founding members of the Asia-Pacific Group on Money-Laundering in 1997, and was admitted as a member of the Egmont Group of Financial Intelligence Units in 2002. Singapore is also a member of the Asia Development Bank's and Organisation for Economic Cooperation and Development's joint Anti-Corruption Initiative for Asia and the Pacific, which it endorsed on December 30, 2001.

## 02 | Foreign and domestic bribery laws

### Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The primary Singapore statutes prohibiting bribery are the Prevention of Corruption Act (PCA) (Cap 241, 1993 Rev Ed) and the Penal Code (Cap 224, 2008 Rev Ed).

Sections 5 and 6 of the PCA prohibit bribery in general.

Section 5 makes active and passive bribery by individuals and companies in the public and private sectors an offence.

Section 6 makes it an offence for an agent to be corruptly offered or to corruptly accept gratification in relation to the performance of a principal's affairs or for the purpose of misleading a principal. The term "gratification" is interpreted broadly (see question 05).

Sections 11 and 12 of the PCA prohibit the bribery of domestic public officials, such as members of parliament and members of a public body. A "public body" is defined as:

*[A]ny corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of any written law.*

The Singapore Interpretation Act defines the term "public officer" as "the holder of any office of emolument in the service of the [Singapore] Government".

The PCA does not specifically target bribery of foreign public officials, but such bribery could fall under the ambit of the general prohibitions, namely section 6 on corrupt transactions with agents.

The Penal Code also contains provisions that relate to the bribery of public officials (sections 161 to 165). Public officials are referred to in the Penal Code as "public servants", which have been defined in the Penal Code to include mainly domestic public officials.

Sections 161 to 165 describe the following scenarios as constituting bribery

- A public servant taking a gratification, other than legal remuneration, in respect of an official act.
- A person taking a gratification in order to influence a public servant by corrupt or illegal means.
- A person taking a gratification for exercising personal influence over a public servant.
- Abetment by a public servant of the above offences.

- A public servant obtaining anything of value, without consideration or with consideration the public servant knows to be inadequate, from a person concerned in any proceedings or business conducted by such public servant.

In addition to the above, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) (Cap 65A, 2000 Rev Ed) – Singapore’s key anti-money laundering statute – provides for the confiscation of benefits derived from corruption and other criminal conduct.

## Foreign bribery

### 03 | Legal framework

#### Describe the elements of the law prohibiting bribery of a foreign public official.

As mentioned in question 02, there are no provisions in the PCA or the Penal Code that specifically prohibit bribery of a foreign public official. However, the general prohibition against bribery in the PCA, in particular on corrupt transactions with agents, read together with section 37 of the PCA, prohibits, in effect, the bribery of a foreign public official outside Singapore by a Singaporean citizen.

Section 37 of the PCA gives the anti-corruption legislation extraterritorial effect, because if the act of bribery takes place outside Singapore and the bribe is carried out by a Singaporean citizen, section 37 of the PCA states that the offender would be dealt with as if the bribe had taken place in Singapore.

Under section 5 of the PCA, it is an offence for a person (whether by himself or herself, or in conjunction with any other person) to

- Corruptly solicit, receive, or agree to receive for himself, herself or any other person.
- Corruptly give, promise, or offer to any person, whether for the benefit of that person or of another person, any gratification as an inducement to or reward for, or otherwise on account of
  - Any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed.
  - Any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned.

It is also an offence under section 6 of the PCA for

- An agent to corruptly accept or obtain any gratification as an inducement or reward for doing or forbearing to do any act in relation to his or her principal’s affairs.
- A person to corruptly give or offer any gratification to an agent as an inducement or reward for doing or forbearing to do any act in relation to his or her principal’s affairs.
- A person to knowingly give to an agent a false or erroneous or defective statement, or an agent to knowingly use such statement, to deceive his or her principal.

Section 4 of the Penal Code also creates extraterritorial obligations for all public servants of Singapore and states that any act or omission committed by a public servant outside of Singapore in the course of his or her employment

would constitute an offence in Singapore and will be deemed to have been committed in Singapore. Accordingly, if the public servant accepted a bribe overseas, he or she would be liable under Singaporean law.

The extraterritorial effects of the PCA and Penal Code are limited in the respect that they only apply to Singapore citizens and Singapore public servants respectively. In *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410, a case involving a constitutional challenge to the extraterritoriality of section 37 of the PCA, the court upheld the provision and concluded that it was “rational to draw the line at citizenship and leave out non-citizens, so as to observe international comity and the sovereignty of other nations”.

The court further observed that the language of the provision was wide and “capable of capturing all corrupt acts by Singaporean citizens outside Singapore, irrespective of whether such corrupt acts have consequences within the borders of Singapore or not”.

As regards to non-citizens committing corruption outside Singapore that could cause harm in Singapore, the court opined that section 29 of the PCA, which deals with the abetment of a corrupt act abroad, could be wide enough to address that scenario.

The CDSA, which primarily deals with the prevention of laundering of the proceeds of corruption and other serious crimes, also has extraterritorial application. The CDSA expressly applies to property whether situated in Singapore or elsewhere. In particular, section 47 of the CDSA provides that any person who knows or has reasonable ground to believe that any property represents another person’s benefits from

criminal conduct is guilty of an offence if he or she conceals, disguises, converts, transfers or removes that property from the jurisdiction for the purposes of assisting any person to avoid prosecution. Criminal conduct is defined to include any act constituting a serious crime in Singapore or elsewhere.

#### 04 | Definition of a foreign public official

##### How does your law define a foreign public official?

As the PCA and the Penal Code do not specifically deal with the bribery of a foreign public official, the statutes do not define this term.

#### 05 | Travel and entertainment restrictions

##### To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There are no express restrictions in the PCA or Penal Code on providing foreign officials with gifts, travel expenses, meals or entertainment. However, any gift, travel expense, meal or entertainment provided with the requisite corrupt intent will fall foul of the general prohibition under the PCA, and would constitute an offence.

As noted in question 03, the PCA prohibits (among other things), the offer or provision of any “gratification” if accompanied with the requisite corrupt intent. The term “gratification” is broadly defined under the PCA to include

- Money.
- Gifts.
- Loans.
- Fees.

- Rewards.
- Commissions.
- Valuable security.
- Property.
- Interest in property.
- Employment contract or services or any part or full payment.
- Release from or discharge of any obligation or other liability.
- Any other service, favour or advantage of any description whatsoever (see *Public Prosecutor v Teo Chu Ha* [2014] SGCA 45).

Under the Penal Code, the term “gratification” is used but not expressly defined. The explanatory notes to the relevant section stipulate that the term is not restricted to pecuniary gratifications or those with monetary value.

Singapore’s courts have also held that questionable payments made pursuant to industry norms or business customs will not constitute a defense to any prosecution brought under the PCA (see *Public Prosecutor v Soh Cham Hong* [2012] SGDC 42) and any evidence pertaining to such customs will be inadmissible in any criminal or civil proceedings under section 23 of the PCA (see *Chan Wing Seng v Public Prosecutor* [1997] 1 SLR(R) 721).

#### 06 | Facilitating payments

##### Do the laws and regulations permit facilitating or “grease” payments?

Neither the PCA nor the Penal Code expressly permits facilitating or “grease” payments. Such payments would technically constitute an act of bribery under the general prohibitions

of both the PCA and the Penal Code. Notably, section 12(a)(ii) of the PCA prohibits the offer of any gratification to any member of a public body as an inducement or reward for the member’s “expediting” of any official act, among other prohibited acts.

#### 07 | Payments through intermediaries or third parties

##### In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Corrupt payments through intermediaries or third parties, whether such payments are made to foreign public officials or to other persons, are prohibited. Section 5 of the PCA expressly provides that a person can commit the offence of bribery either “by himself or by or in conjunction with any other person”.

#### 08 | Individual and corporate liability

##### Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery offences, including bribery of a foreign official. The various provisions in the PCA and Penal Code set out certain offences that may be committed by a “person” if such person were to engage in certain corrupt behavior. The term “person” has been defined in the Singapore Interpretation Act to include “any company or association of body of persons, corporate or unincorporated”.

In addition, Singapore case law indicates that corporate liability can be imposed on companies for crimes committed by their employees, agents, etc (see *Tom Reck Security Services Pte Ltd v PP* [2001] 2 SLR 70). A test for establishing corporate liability is

whether the individual who committed the crime can be regarded as the “embodiment of the company” or whose acts “are within the scope of the function of management properly delegated to him”. This test, known as the “identification doctrine”, was derived from English case law (*Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127). It was subsequently broadened in the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, which held that the test for attributing mental intent should depend on the purpose of the provision creating the relevant offence. This broader approach has been affirmed in Singapore (The *Dolphina* [2012] 1 SLR 992) in a case involving shipping and conspiracy but not in the context of bribery offences.

However, the test for corporate liability is different in relation to money-laundering offences. Section 52 of the CDSA introduces a lower threshold of proof for corporate liability. It provides that where it is necessary to establish the state of mind of a body corporate in respect of conduct engaged by the body corporate it shall be sufficient to show that a director, employee or agent of the body corporate acting within the scope of his or her actual or apparent authority, had that state of mind. Likewise, any conduct engaged in or on behalf of a body corporate by a director, employee or agent of the body corporate acting within the scope of his or her actual or apparent authority, or by any other person at the direction or with the consent or agreement of the above, shall be deemed, for the purposes of the CDSA, to have been engaged in by the body corporate.

Generally, individual directors and officers of a company will not be held strictly liable for offences found to have been committed by the company if they were not personally responsible for, or otherwise involved in, that

particular offence. However, section 59 of the CDSA provides that where an offence under the CDSA committed by a body corporate is proved to have been committed with the consent or connivance of an officer or to be attributable to any neglect on his or her part, the officer as well as the body corporate shall be guilty of the offence. It is also possible that an individual such as a director or officer of a company, although not personally guilty of committing a corrupt act, may be held liable for consequential offences including money laundering or failure to report a suspicion that certain property or the transfer of assets was connected to criminal conduct. In addition, individual directors who ignore red flags of criminal misconduct committed by employees of the company may also find themselves liable for failing to use reasonable diligence in performing their duties under the Companies Act (Cap 50). A former president of a shipyard was recently prosecuted for this infraction (see question 32).

Ultimately, the decision on whether to pursue an individual or a corporate entity for criminal conduct is a matter of prosecutorial discretion. In this regard, an opinion-editorial written by Singapore’s then attorney-general, Mr VK Rajah SC, in November 2015 sheds some light on Singapore’s approach on such matters. In his opinion-editorial, Mr Rajah stated that in Singapore both individuals and corporate entities should expect prompt enforcement action for financial misconduct. However, he pointed out that, “[t]he emphasis, if there is one, is placed on holding accountable the individuals who perpetuated the misconduct”. In addition, he stressed that “significant attention is also given to the culpability of corporations . . . especially if the offending conduct is institutionalized and developed into an established practice in an entity over time”.

## 09 | Successor liability

### Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

In a situation where the acquiring entity purchases shares in the target entity, the acquiring entity is not legally liable for bribery of foreign officials by the target entity that occurred prior to the acquisition. This is because of the common law doctrine of separate legal personality.

Likewise, there is no change to the legal liability or otherwise of the target entity following the change of identity of its shareholder or shareholders.

Subsequent to the acquisition, the commercial value of the acquiring entity may be adversely affected in the event that the target entity is investigated, prosecuted or ultimately held liable for bribery of foreign officials occurring prior to the acquisition. The target entity may be liable for investigation costs, suffer business disruptions and loss of revenue and may have to bear financial penalties or debarment consequences. These may adversely impact the value of the shares in the target entity, which are in turn owned by the acquiring entity.

## 10 | Civil and criminal enforcement

### Is there civil and criminal enforcement of your country’s foreign bribery laws?

Yes, criminal enforcement against corrupt activities is provided for in both the PCA and the Penal Code. In particular, if the court rules that there has been a violation of the general prohibitions on bribery in the PCA, a penalty of a fine, imprisonment or both will be imposed on the offender. The offender may also have to pay the quantum of the bribe received.

With regard to civil enforcement, a victim of corruption will be able to bring a civil action to recover the property of which it has been deprived. Section 14 of the PCA expressly provides that, where gratification has been given to an agent, the principal may recover, as a civil debt, the amount or the money value thereof either from the agent or the person paying the bribe. This provision is without prejudice to any other right and remedy that the principal may have to recover from his agent any money or property. The objective of imposing this additional penalty is to disgorge the offender's proceeds from the corrupt transaction.

The case *Ho Kang Peng v Scintronix Corp Ltd* (formerly known as TTL Holdings Ltd) [2014] SGCA 22 provides an example of a company successfully bringing a civil claim against its former chief executive and director, Ho Kang Peng, for engaging in corrupt activities. The Court of Appeal dismissed Ho's appeal from the High Court, holding that he had breached his fiduciary duties owed to the company by making and concealing unauthorized payments in the name of the company. The Court of Appeal found that although the payments were for the purpose of securing business for the company, Ho could not be said to be acting in the genuine interests of the company because the payments were, in effect, gratuities and thereby ran the unjustified risk of subjecting the company to possible criminal liability.

## 11 | Agency enforcement

### What government agencies enforce the foreign bribery laws and regulations?

The main government agency that enforces bribery laws in Singapore is the Corrupt Practices Investigation Bureau (CPIB). The CPIB derives its powers from the PCA and is responsible for investigating and preventing corruption in Singapore, focusing on corruption-related offences arising under the PCA and the Penal Code.

Under the PCA, the CPIB has extensive powers of investigation, which include powers to require the attendance of witnesses for interview, to investigate a suspect's financial and other records and the power to investigate any other seizable offence disclosed in the course of a corruption investigation. Seizable offences are also known as "arrestable offences" (i.e. offences where the persons committing the offences can be arrested without a warrant of arrest). Special investigative powers can be granted by the public prosecutor, such as the power to investigate any bank account, share account, purchase account, expense account or any other form of account or safe deposit box and to require the disclosure of all information, documents or articles required by the officers.

The CPIB carries out investigations into complaints of corruption but does not prosecute cases itself. It refers the cases, where appropriate, to the public prosecutor for prosecution. The PCA provides that no prosecution under the PCA shall be instituted except by or with the consent of the public prosecutor.

The Commercial Affairs Department (CAD) is the principal white-collar crime investigation agency in Singapore. CAD investigates complex fraud, white-collar crime, money laundering and terrorism financing. CAD's Financial Investigation Division is specially empowered to combat money laundering, terrorism financing and fraud involving employees of financial institutions in Singapore and works closely with financial institutions, government agencies and its foreign counterparts.

The Financial and Technology Crime Division (FTCD) was established within the Attorney-General's Chambers (AGC) in November 2014, as part of a re-designation of the Economic Crimes and Governance Division (EGD) to

bring the prosecution of cybercrime under the division's purview. The EGD had been responsible for the enforcement, prosecution and all related appeals in respect of financial crimes and corruption cases within and outside of Singapore. The reorganized division focuses on financial crimes ranging from securities fraud and money laundering to corruption and criminal breach of trust, as well as a broad range of cybercrimes. It is one of two divisions in AGC's crime cluster, with the Criminal Justice Division being the other. The Monetary Authority of Singapore (MAS) is responsible for issuing guidelines on money laundering and terrorist financing to financial institutions and conducting regulatory investigations on such matters. MAS may also refer potential criminal offences to CAD for further investigation. In this regard, in 2015, MAS and CAD embarked on an initiative to jointly investigate market misconduct offences under the Securities and Futures Act (Cap 289, 2006 Rev Ed). The first conviction of market misconduct under the joint investigations arrangement was reported in March 2017. It is possible that MAS and CAD may expand this joint investigation initiative to other financial crime offences.

## 12 | Leniency

### Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The PCA and the Penal Code do not expressly provide a formal mechanism for companies to disclose violations of bribery laws in exchange for leniency.

While there are no formal legislative mechanisms in place, an informal plea-bargaining process with the public prosecutor is available. Where charges have not yet been filed, an accused can submit letters of representation to the public prosecutor pleading for leniency and seeking issuance of a stern warning or a conditional warning

instead of prosecution for the offending conduct, highlighting any merits of the case that may warrant the favorable exercise of the public prosecutor's discretion. (See question 13.)

Even after charges have been filed, an accused can still submit letters of representation to the public prosecutor to negotiate the possible withdrawal, amendment or reduction of the charges, similarly highlighting any merits of the case that may warrant the exercise of the public prosecutor's discretion to do so. At this stage, a withdrawal of the charges may be accompanied by a stern warning or a conditional warning.

It should be noted that the public prosecutor retains the sole discretion to accede to the requests in such letters of representation.

Apart from the informal plea-bargaining process set out above, Singapore's courts introduced a voluntary Criminal Case Resolution programme in October 10, 2011, where a senior district judge functions as a neutral mediator between the prosecution and defence with a view to parties reaching an agreement. Once proceedings have been initiated, the accused may, having reviewed the evidence in the prosecution's case, choose to plead guilty and enter a plea mitigation to avoid a public trial. In appropriate cases, the judge may also provide an indication of sentence. However, such indication will only be provided if requested by the accused. If the mediation is unsuccessful, the judge will not hear the case.

In October 2010, there was a court ruling involving the CEO of AEM-Evertech, a Singapore-listed company, who exposed corrupt practices by the company's top management, including himself (see *Public Prosecutor v Ang Seng Thor* [2010] SGDC 454 – the AEM-Evertech case). In sentencing

the CEO, the district judge took into consideration the fact that his whistle-blowing helped to secure the conviction of other members of the company's management and consequently did not impose a prison sentence. However, in May 2011, the prosecution successfully appealed against this decision. It was held by the High Court that the judge in the first instance, had, on the facts, incorrectly found that the CEO's role in the matter demonstrated a low level of culpability (see *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217). It also found that the CEO was not an archetypal whistleblower, owing to the fact that he only admitted personal wrongdoing when placed under investigation by the CPIB in May 2007 and had failed to approach the authorities directly with evidence of unauthorized activities. The sentence imposed at first instance was therefore set aside and substituted with a sentence of six weeks' imprisonment and a fine of S\$25,000 on each of the two charges, with each prison sentence to run consecutively. Although the High Court overruled the first instance decision, the case confirms that a genuine whistleblower would potentially be treated with a degree of leniency during sentencing. The exercise of judicial discretion will depend, in part, on the motivation of the whistleblower and the degree of cooperation during the investigation.

### 13 | Dispute resolution

**Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?**

The public prosecutor has the discretion to initiate, conduct or discontinue any criminal proceedings. It may be possible for a person under investigation to convince the public prosecutor not to initiate criminal proceedings against him or her or, as described in question 12, if criminal proceedings have already been initiated, an accused person may

submit letters of representation (on a "without prejudice" basis) to the public prosecutor to negotiate the possible withdrawal, amendment, or reduction of charges.

The public prosecutor has sole discretion whether to accede to such letters of representation. It may also be possible for an accused person to plead guilty to certain charges, in return for which the public prosecutor will withdraw or reduce certain other charges. The accused may also plead guilty to the charges brought against him or her so as to resolve a particular matter without a trial, and then enter a mitigation plea. The public prosecutor may also direct the enforcement agency to issue a "stern warning" instead of prosecution.

A "stern warning" is an exercise of prosecutorial discretion granted to the attorney-general as the public prosecutor and the use of such means is not governed by statute. Therefore, a "stern warning" does not result in a conviction; the accused person will not have any criminal record for the infraction. In a Singapore High Court decision, *PP v Wham Kwok Han Jolovan* [2016] 1 SLR 1370, the legal effect of a "stern warning" was considered. In that case, the High Court held that a "stern warning" was not binding on its recipient such that it affected the legal rights, interests or liabilities, and that it is:

*[N]o more than an expression of the relevant authority that the recipient has committed an offence . . . [i]t does not and cannot amount to a legally binding pronouncement of guilt or finding of fact.*

The public prosecutor may also direct an enforcement agency to issue a "conditional warning" instead of prosecution, which is a variant of a "stern warning", albeit with certain conditions or stipulations attached to it. Common conditions include

an undertaking not to commit a criminal offence for a stipulated period (usually between 12 to 24 months) or an undertaking to pay a sum of money to the victim as compensation. Traditionally, “conditional warnings” were used in minor criminal offences involving youths or in a community or domestic context as a means of diverting such cases from the criminal justice system. However, it is possible, as seen in a recent case involving a Singapore-based shipbuilding company (see question 17), for the public prosecutor to issue a “conditional warning” in order to settle corporate criminal conduct in a similar manner as that of a corporate deferred prosecution agreement (DPA) in the United States or United Kingdom.

In March 2013, the AGC and the Law Society issued the Code of Practice for the Conduct of Criminal Proceedings by the prosecution and defence, which is a joint code of practice that sets out the duties of prosecutors and lawyers during criminal trials and deals with various matters including plea bargaining.

#### **14 | Patterns in enforcement**

**Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.**

Significantly, in January 2015 Singapore’s prime minister announced that the capabilities and manpower of the CPIB were to be strengthened by more than 20 per cent, as corruption cases had become more complex, with some having international links. This announcement follows the reorganization of the EGD to the FTCD (see question 11) signalled an intent by the AGC to actively enforce and prosecute complex bribery offences, including cybercrime, committed outside Singapore that may involve foreign companies and foreign public officials.

The Mutual Assistance in Criminal Matters Act was revised in July 2014 to improve Singapore’s ability to provide mutual legal assistance to other countries and demonstrates a commitment to cross-border cooperation. The amendments primarily ease requirements that foreign countries would need to satisfy to make requests for legal assistance and widen the scope of mutual legal assistance that Singapore can provide.

In a related development, on July 5, 2017, the CPIB joined its counterparts from Australia, Canada, New Zealand, the United Kingdom and the United States in launching the International Anti-Corruption Cooperation Centre (IACCC). The IACCC will be hosted by the UK National Crime Agency in London until 2021. The IACCC aims to coordinate law enforcement action against global grand corruption. The CPIB has announced that it will be sending an officer to serve at the IACCC. Singapore’s participation in the IACCC is likely to result in Singaporean authorities taking a more proactive role in investigating foreign bribery cases with Singaporean links.

Public sector complaints and prosecutions remain consistently low due, in part, to the aggressive enforcement stance taken by the CPIB, as well as to the high wages paid to public servants that reduce the financial benefit of taking bribes as compared to the risk of getting caught. The majority of the CPIB’s investigations relate to the private sector, which for 2016 made up 85 per cent of its investigations registered for action (a 4 per cent decrease from the previous year – according to the CPIB – due to the small number of cases registered for action, this decrease is not significant).

There is a trend of law enforcement agencies using anti-money-laundering laws and falsification of accounts provisions (section 477A of the Penal Code) to prosecute foreign bribery cases (see question 18). This is because it is often difficult to prove the predicate bribery offences in such cases, owing to the fact that key witnesses are often located overseas. An example of this approach can be seen in the prosecution of Thomas Philip Doerhman and Lim Ai Wah (the Questzone case), who were sentenced to 60 and 70 months’ jail respectively on September 1, 2016, for falsifying accounts under section 477A and money-laundering offences under the CDSA. Doerhman and Lim, who were both directors of Questzone Offshore Pte Ltd (Questzone), were prosecuted for conspiring with a third individual, Li Weiming, in 2010 to issue a Questzone invoice to a Chinese telecommunications company seeking payment of US\$3.6 million for a fictitious subcontract on a government project in a country in the Asia-Pacific. Li was the chief representative for the Chinese company in that country. A portion of the monies paid out by the Chinese company to Questzone, pursuant to its invoice, was then subsequently redistributed by Doerhman and Lim to Li and the then prime minister of that Asia-Pacific country in 2010.

Even though no corruption charges were brought under the PCA against the parties, it is plainly conceivable that Questzone functioned as a corporate conduit for corrupt payments to be made. On the facts, some key witnesses were overseas – with Li having absconded soon after proceedings against him commenced. The use of section 477A and money-laundering charges under the CDSA allowed the prosecution to proceed against Doerhman and Lim as they only

needed to prove that the invoice was false, in respect of the section 477A charge; and that the monies paid out pursuant to the invoice – which would be proceeds of crime or property used in connection with criminal conduct – were transferred to Li and the then prime minister of the Asia-Pacific country, in respect of the money-laundering offences.

The use of section 477A of the Penal Code was also employed in the case relating to a Singapore shipyard (see details at question 32), which involved senior executives of the shipyard conspiring to bribe employees of its customers in order to obtain business from these customers. The bribes were disguised as bogus entertainment expenses that were paid out from petty cash vouchers as approved by the senior executives. It is pertinent to note that these senior executives did not carry out the actual payment of the bribes but had approved the fraudulent petty cash vouchers, which they knew did not relate to genuine entertainment expense claims.

## 15 | Prosecution of foreign companies

### In what circumstances can foreign companies be prosecuted for foreign bribery?

Under the general offences of the PCA, foreign companies can be prosecuted for the bribery of a foreign public official if the acts of bribery are committed in Singapore (see question 02). In addition, section 29 of the PCA read together with section 108A of the Penal Code allows foreign companies to be prosecuted for bribery that was substantively carried out overseas, if the aiding and abetment of such bribery took place in Singapore.

## 16 | Sanctions

### What are the sanctions for individuals and companies violating the foreign bribery rules?

The PCA provides for a fine, a custodial sentence, or both for the contravention of the general anti-corruption provisions under sections 5 and 6 (which include the bribery of foreign public officials in Singapore, and the bribery of foreign public officials overseas by a Singaporean citizen when read with section 37). The guilty individual or company may be liable to a fine not exceeding S\$100,000 or imprisonment for a term not exceeding five years, if appropriate.

Where the offence involves a government contract or bribery of a member of parliament, the maximum custodial sentence has been extended to seven years (see question 30). There are also civil remedies and penalties for the restitution of property pursuant to the PCA (see question 10). A person convicted of an offence of bribery under the Penal Code may be sentenced to a fine and a custodial sentence of up to three years.

There are other statutes imposing sanctions on the guilty individuals or companies. For example, under the CDSA, where a defendant is convicted of a “serious offence” (which includes bribery), the court has the power, under section 4, to make a confiscation order against the defendant in respect of benefits derived by him from criminal conduct. Under the Companies Act (Cap 50, 2006 Rev Ed), a director convicted of bribery offences may be disqualified from acting as a director.

## 17 | Recent decisions and investigations

### Identify and summarize recent landmark decisions or investigations involving foreign bribery.

In December 2017, a Singapore-based company in the shipbuilding industry entered into a global resolution led by the US Department of Justice (US DOJ) in connection with corrupt payments made to officials of a Brazilian state-owned enterprise, Petroleo Brasileiro SA (Petrobras), and other parties, in order to win contracts with Petrobras and/or its related companies. The company concealed these corrupt payments by paying commissions to an intermediary, under the guise of legitimate consulting agreements, who then made payments for the benefit of officials of Petrobras and other parties. Under the terms of the global resolution, the company entered into a DPA with the US DOJ and agreed to pay total criminal penalties amounting to US\$422.2 million to the United States, Brazil and Singapore.

In Singapore, the company received a “conditional warning” (see question 13) from the CPIB for corruption offences under section 5(1)(b)(i) of the PCA and committed to certain undertakings under the “conditional warning”, including an undertaking to pay US\$105.55 million to Singapore as part of the total criminal penalties imposed pursuant to the global resolution.

In a statement on the resolution, Singaporean authorities pointed out that in deciding to issue a “conditional warning” to the company, due consideration had been given to the company for its substantial cooperation (including the company’s self-reporting to Singaporean authorities for the corrupt payments) and the extensive remedial measures taken by the company thus far.

The issues faced by the Singapore-based shipbuilding company arose from a wider investigation by Brazilian authorities called “Lava Jato” or “Operation Car Wash” (see Brazil chapter). In this connection, it has been reported that a second Singapore-based company and its affiliates may also be potentially implicated in relation to similar transactions entered into with Petrobras and/or its related companies. To date, there has been no further updates on the allegations concerning the second Singapore-based shipbuilding company.

In an ongoing case involving foreign bribery, two executives from Glenn Defense Marine Asia (GDMA), who were extradited from Singapore to stand trial in the US, were convicted and sentenced to imprisonment in a San Diego federal court for their role in a bribery scandal involving GDMA’s CEO and chair, nicknamed “Fat Leonard”, and numerous high-ranking US Navy officials.

“Fat Leonard” is a Singapore-based Malaysian businessman who was arrested in San Diego, US, in a sting operation while on a business trip in September 2013, for allegedly bribing US Navy officers to reveal confidential information about the movement of US Navy ships and defrauding the US Navy through numerous contracts relating to support services for American naval vessels in Asia. The US authorities claim that the US Navy has been defrauded of nearly US\$35 million. The US government has barred GDMA from any new contracts and terminated nine contracts worth US\$205 million that it had with the US Navy. To date, at least 20 defendants, including top US Navy officials and a US Naval Criminal Investigative Service investigator have been indicted. “Fat Leonard” and some of the other defendants have also pleaded guilty to various charges involving bribery. In December 2015, a former US Navy employee, who was the

lead contract specialist at the material time, was reportedly charged in court in Singapore with (among others) seven counts of corruptly receiving cash and paid accommodation. The allegation was that she had received more than S\$130,000 in the form of cash and paid accommodation in luxury hotels from GDMA as a reward for the provision of non-public US Navy information.

In connection with the transnational money-laundering investigation linked to a Malaysian state investment fund, MAS ordered the closure of BSI and Falcon Bank for serious lapses in anti-money-laundering requirements. Several other major banks in Singapore were also censured and fined for their role in the scandal. In connection with the investigation, several individuals have been charged in court. A former BSI banker, Yak Yew Chee, pleaded guilty to four criminal charges of forgery and failing to report suspicious transactions in November 2016. He was sentenced to 18 weeks’ jail and a fine of S\$24,000. The trial of another former BSI banker, Yeo Jiawei, for witness tampering concluded on December 22, 2016. He was sentenced to 30 months’ jail at the time. He subsequently pleaded guilty to money laundering and cheating in July 2017 and was sentenced to four-and-a-half years jail – this would run concurrently with his earlier 30-month jail sentence. During the course of the trial, details emerged as to how the banker allegedly facilitated the flow of illicit funds through Singapore’s financial system. Falcon Bank’s branch manager, Jens Sturzenegger, was also prosecuted and sentenced to 28 weeks’ jail and a fine of S\$128,000. Among other things, Sturzenegger was charged with consenting to the bank’s failure to file a suspicious transaction report to MAS. MAS’ investigation into the matter has since concluded and a total of S\$29.1 million in financial penalties have been imposed on eight banks for breaches of

anti-money-laundering requirements. Various individuals involved in the matter have also been sanctioned by MAS.

In June 2017, siblings Judy Teo Suya Bik and Teo Chu Ha were charged in Singapore for corruption-related offences allegedly committed in China between April 2007 and November 2010. Teo Chu Ha was a former senior director of Seagate Technology International. The siblings allegedly conspired to obtain bribes from Chinese transport companies as a reward for helping these companies secure contracts with Seagate Technology International. The siblings were also accused of one count each of an offence under the CDSA, in connection with a purchase of a condominium unit. Judy Teo and Teo Chu Ha were charged with the offences under the PCA even though the offending conduct allegedly took place in China because the PCA has extraterritorial jurisdiction over Singapore citizens (see question 03).

## Financial record-keeping

### 18 | Laws and regulations

**What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?**

The Companies Act is the main statute that regulates the conduct of Singapore-incorporated companies. Among other things, the Companies Act requires the keeping of proper corporate books and records that

- Sufficiently explain the transactions and financial position of the company.
- Contain true and fair profit and loss accounts and balance sheets for a period of at least five years.
- Allow for the appointment of

external auditors.

- Include the filing of annual returns.

The Act was amended in October 2014 to reduce the regulatory burden on companies, provide for greater business flexibility and improve corporate governance. Amendments include revised requirements for audit exemptions, inclusion of a requirement that CEOs disclose conflicts of interest and the removal of the requirement that private companies keep a register of members.

Apart from the requirements set out under the Companies Act, section 477A of the Penal Code also criminalizes the falsification of a company's accounts by a clerk or a servant of the company with intent to defraud.

Singapore-listed companies are also subject to stringent disclosure, auditing and compliance requirements as provided by

- The Securities and Futures Act.
- The Singapore Exchange Limited (SGX) Listing Rules.
- The Code of Corporate Governance.
- Other relevant rules.

The SGX Listing Rules state that a company's board "must provide an opinion on the adequacy of internal controls". The Code of Corporate Governance provides that the board "must comment on the adequacy and effectiveness of risk management and internal control system".

Companies that do not comply with the laws and regulations may be investigated by CAD, the Accounting and Regulatory Authority of Singapore or other regulatory bodies.

## 19 | Disclosure of violations or irregularities

### To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Section 39 of the CDSA imposes reporting obligations on persons who know or have reasonable grounds to suspect that there is property that represents the proceeds of, or that was used or was intended to be used in connection with criminal conduct. Criminal conduct includes acts of bribery (which potentially extends to acts of bribery overseas) and falsification of accounts under section 477A of the Penal Code. A breach of these reporting obligations attracts a fine of up to S\$20,000.

Section 424 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (CPC) also imposes reporting obligations on every person aware of the commission of or the intention of any other person to commit most of the corruption crimes (relating to bribery of domestic public officials) set out in the Penal Code.

Section 69 of the CPC allows the police to conduct a formal criminal discovery exercise during the course of corruption investigations, empowering them to search for documents and access computer records.

Apart from these express reporting and disclosure obligations under the CDSA and the CPC, the requirements imposed by the Companies Act, Securities and Futures Act, Listing Rules, regulations and guidelines issued by MAS may also impose obligations on a company or financial institution to disclose corrupt activities and associated accounting irregularities.

On May 2, 2012, MAS issued a revised Code of Corporate Governance, which, in conjunction with the Listing Rules, sets out a number of obligations that listed companies are expected to observe. This version of the Code

imposes stringent requirements relating to the role and composition of the Board of Directors (Principles 1 and 2), risk management and internal controls (Principle 11) and the need to have an adequate whistle-blowing policy in place (Principle 12). The Listing Rules require listed companies to disclose, in their annual reports, a board commentary assessing the companies' internal control and risk management systems.

On May 10, 2012, MAS issued Risk Governance Guidance for Listed Boards to provide practical guidance for board members on managing risk. On February 27, 2017, MAS announced that it has formed a Corporate Governance Council to review the Code of Corporate Governance.

## 20 | Prosecution under financial record-keeping legislation

### Are such laws used to prosecute domestic or foreign bribery?

No. The laws primarily used to prosecute domestic or foreign bribery are the PCA and the Penal Code

## 21 | Sanctions for accounting violations

### What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Falsifying accounts in order to facilitate the payment of bribes is a violation of section 477A of the Penal Code. The penalty for violating section 477A of the Penal Code is imprisonment for a term of up to 10 years, or a fine, or a combination of both.

Apart from section 477A, sanctions for violations of the laws and regulations relating to proper account keeping, auditing, etc, include fines and terms of imprisonment. The amount of any fine and length of imprisonment will depend on the specific violation in question. Liability may be imposed on the company, directors of the company and other officers of the company.

## 22 | Tax-deductibility of domestic or foreign bribes

### Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Tax deduction for bribes (whether domestic or foreign bribes) is not permitted. Bribery is an offence under the PCA and the Penal Code.

## Domestic bribery

### 23 | Legal framework

#### Describe the individual elements of the law prohibiting bribery of a domestic public official.

The general prohibition on bribery in the PCA (see question 02) specifically states, at section 5, that it is illegal to bribe a domestic public official.

Where it can be proved that gratification has been paid or given to a domestic public official, section 8 provides for a rebuttable presumption that such gratification was paid or given corruptly as an inducement or reward. The burden of proof in rebutting the presumption lies with the accused on a balance of probability. In *Public Prosecutor v Ng Boon Gay* [2013] SGDC 132 (Ng Boon Gay case), the prosecution argued that the threshold to establish the presumption was very low and ultimately any “gratification” given to a public official by someone intending to deal with the official or government would be enough to create the rebuttable presumption. On the facts of the case, however, the defense succeeded in rebutting the presumption.

Prohibition of the bribery of a domestic public official is also set out in sections 11 and 12 of the PCA as outlined below. Section 11 relates to the bribery of a member of parliament. It is an offence for any person to offer any gratification to a member of parliament as an inducement or reward for such member’s doing or forbearing to do any act in his capacity as a member of

parliament. It will also be an offence for a member of parliament to solicit or accept the above gratification. Section 12 relates to the bribery of a “member of a public body”. (For the definition of “public body” see questions 02 and 25.) It is an offence for a person to offer any gratification to a member of such a public body as an inducement or reward for

- The member’s voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to that public body.
- The member’s performing, or abstaining from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of, any official act.
- The member’s aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person.

It will, correspondingly, be an offence for a member of a public body to solicit or accept such gratification described above.

The Penal Code also sets out a number of offences relating to domestic public officials (termed “public servant”). The prohibited scenarios are outlined in question 02. The Singapore government also issues the Singapore Government Instruction Manual (Instruction Manual) to all public officials. The Instruction Manual contains stringent guidelines regulating the conduct of public officials.

## 24 | Prohibitions

### Does the law prohibit both the paying and receiving of a bribe?

Yes. Singapore law prohibits both the paying and receiving of a bribe. In particular, sections 5, 11 and 12 of the PCA prohibit both the paying of a bribe to, and receiving of a bribe by, a domestic public official.

## 25 | Public officials

### How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A public official is referred to as a “member, officer or servant of a public body” in the PCA. There are also specific provisions at section 11 of the PCA in respect of members of parliament. “Public body” has been defined in section 2 of the PCA to mean any:

*[C]orporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law (ie, Singapore's legislation) relating to public health or to undertakings or public utility or otherwise administer money levied or raised by rates or charges in pursuance of any written law.*

In the *Ng Boon Gay* case and *Public Prosecutor v Peter Benedict Lim Sin Pang* DAC 2106-115/2012 (Peter Lim case) – in which the former Singapore Civil Defence Force Chief was found guilty and sentenced to six months jail for corruptly obtaining sexual favours in exchange for the awarding of contracts – both the Central Narcotics Bureau and the Singapore Civil Defence Force were unsurprisingly held by the courts to be public bodies.

In *Public Prosecutor v Tey Tsun Hang* [2013] SGDC 164 (Tey Tsun Hang case) – where the former law professor at National University of Singapore was convicted for obtaining sex and gifts from one of his students but was later acquitted on appeal – despite the arguments of defense counsel, the National University of Singapore (NUS) was also found to be a public body, being a “corporation which has the power to act ... relating to ... public utility or otherwise to administer money levied or raised by rates or charges”, since “public utility” included the provision of public tertiary education. The receipt by the NUS of funds from the government

and its function as an instrument of implementing the government's tertiary education policy further supported the finding that the NUS was a "public body".

The provisions in the Penal Code pertaining to domestic public officials use the term "public servant". This has been defined in section 21 to include

- An officer in the Singapore Armed Forces.
- A judge.
- An officer of a court of justice.
- An assessor assisting a court of justice or public servant.
- An arbitrator.
- An office holder empowered to confine any person.
- An officer of the Singapore government.
- An officer acting on behalf of the Singapore government.
- A member of the Public Service Commission or Legal Service Commission.

It would appear from the above definitions under the PCA and the Penal Code that an employee of a state-owned or state-controlled company may not necessarily be a domestic public official. Such employees of state-owned or state-controlled companies may be considered domestic public officials if they fall within the definitions set out in the PCA and the Penal Code.

It should also be noted that the Singapore Interpretation Act defines the term "public officer" as "the holder of any office of emolument in the service of the [Singapore] Government".

## 26 | **Public official participation in commercial activities**

### **Can a public official participate in commercial activities while serving as a public official?**

The Instruction Manual, which applies to all Singapore public officials, is a comprehensive set of rules that govern how public officials should behave in order to avoid corruption. The Instruction Manual allows public officials to participate in commercial activities but sets out certain restrictions, such as public officials not being allowed to profit from their public position. The Instruction Manual details how public officials can prevent conflicts of interest from arising and when consent must be obtained. Consent is required for various investment activities such as holding shares in private companies, property investments and entering into financial indebtedness.

The CPIB also advises domestic public officials not to undertake any paid part-time employment or commercial enterprise without the written approval of the appropriate authorities. Subject to such safeguards and approvals, a public official is allowed to participate in commercial activities while in service.

In September 2015, Singapore's prime minister issued a letter to members of parliament (MPs) of the ruling party, the People's Action Party (PAP), on rules of prudence. Among other things, PAP MPs were told to separate their business interests from politics and not to use their parliamentary position to lobby the government on behalf of their businesses or clients. PAP MPs were also told to reject any gifts that may place them under obligations that may conflict with their public duties, and were directed to declare any gifts received other than those from close personal friends or relatives to the clerk of parliament for valuation. Like public servants, ruling party MPs are required

to pay the government the valuation price of the gifts if they wish to retain such gifts.

## 27 | **Travel and entertainment**

### **Describe any restrictions on providing domestic officials with travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?**

The analysis in question 05 will apply to both the giving and receiving of such benefits to and by domestic officials. It should also be noted that domestic public officials are not permitted to receive any money or gifts from people who have official dealings with them, nor are they permitted to accept any travel and entertainment, etc, that will place them under any real or apparent obligation.

## 28 | **Gifts and gratuities**

### **Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?**

There are no specific types of gifts and gratuities that are considered permissible under the PCA and the Penal Code. Any gift or gratuity is potentially caught by the PCA and the Penal Code if it meets the elements required by the statutes and is accompanied with the requisite corrupt intent.

Domestic public servants are also subject to the requirements of the Instruction Manual, which details the circumstances in which gifts and entertainment can be accepted and when they must be declared. As a matter of practice, public servants are generally not permitted to accept gifts or entertainment given to them in their capacity as public servants or in the course of their official work unless it is not practicable for them to reject the gift. Upon acceptance of the gift, the public servant is required to disclose the gift to his or her permanent

secretary. Only gifts valued at less than S\$50 can be kept by the public servant. Any gift valued at more than S\$50 can only be kept by the public servant if it is independently valued and purchased from the government by the public servant. Alternatively, a gift that is valued at more than S\$50 would have to be surrendered to the government.

By comparison, in the Tey Tsun Hang case, the court heard that the NUS Policy on Acceptance of Gifts by Staff requires consent to be sought for all gifts worth more than S\$100.

## 29 | Private commercial bribery Does your country also prohibit private commercial bribery?

The PCA contains provisions that prohibit bribery in general, and these prohibitions extend to both private commercial bribery as well as bribery involving public officials.

## 30 | Penalties and enforcement

### What are the sanctions for individuals and companies violating the domestic bribery rules?

The sanctions for individuals and companies violating the domestic bribery rules are similar to those set out in question 16, apart from the following.

The penalties for bribery of domestic public officials under the PCA are more severe than those for general corruption offences. While the general bribery offences under sections 5 and 6 are punishable by a fine not exceeding S\$100,000, imprisonment not exceeding five years, or both, the bribery of a member of parliament or a member of a public body under sections 11 and 12 respectively may result in a fine not exceeding S\$100,000, imprisonment for a term not exceeding seven years, or both.

In addition, the domestic public official involved in corruption would be exposed to departmental

disciplinary action, which could result in punishments such as

- Dismissal from service.
- Reduction in rank.
- Stoppage or deferment of salary increment.
- Fine or reprimand.
- Involuntary retirement.

Furthermore, the Instruction Manual debars companies that are guilty of corruption involving public officials from public contract tenders. Other measures include the termination of an awarded contract and the recovery of damages from such termination.

## 31 | Facilitating payments Have the domestic bribery laws been enforced with respect to facilitating or “grease” payments?

As stated in question 06, facilitating or “grease” payments are technically not exempt under Singapore law. In particular, as regards domestic public officials, section 12 of the PCA prohibits the offering of any gratification to such officials as an inducement or reward for the official’s “performing, or . . . expediting . . . The performance” of any official act.

Accordingly, it is also an offence under section 12 of the PCA for the domestic public official to accept any gratification intended for the purposes above.

## 32 | Recent decisions and investigations

### Identify and summarize recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In *Public Prosecutor v Syed Mostafa Romel* [2015] 3 SLR 1166, the

Singapore High Court made clear that private sector bribery was as abhorrent as public sector bribery, tripling the jail term (from two to six months) of a marine surveyor convicted on corruption charges relating to the receipt of bribes to omit safety breaches in his reports. The case is significant for the guidance it gives on sentencing of corruption charges. More importantly, it dispels any perceived distinction between corruption in the private and public sectors.

A Singapore shipyard providing shipbuilding, conversion and repair services worldwide was embroiled in a corruption scandal in which seven senior executives, including three presidents, a senior vice president, a chief operating officer (COO) and two group financial controllers, were implicated in conspiracies to bribe agents of customers in return for contracts between 2000 and 2011. A total of at least S\$24.9 million in bribes were paid out during the period.

An integral part of this scheme involved disguising the bribes as bogus entertainment expenses that were paid out from petty cash vouchers as approved by the accused persons. It should be noted that none of these executives carried out the actual bribe payments. Rather, they approved the fraudulent petty cash vouchers, which they knew were not genuine entertainment expense claims that were presented to them.

Between December 2014 and June 2015, the senior executives were charged with corruption for conspiring to pay bribes, and for conspiring to defraud the company through the falsification of accounts and the making of petty cash claims for bogus entertainment expenses.

The prosecution of the case is presently ongoing. To date, the cases against four senior executives have concluded.

The former senior vice president and former COO/deputy president were both sentenced to imprisonment and a fine. The former group financial controller, who was the first to plead guilty and had committed to testifying against his co-conspirators, was handed a S\$210,000 fine for his role in the conspiracy. The ex-president of the company, who was not alleged to be privy to the conspiracy, was also prosecuted. He was prosecuted under section 157 of the Companies Act for failing to use reasonable diligence to perform his duties and was sentenced to 14 days' jail under a detention order. In this case, the prosecutor alleged that he had ignored information that pointed to criminal wrongdoing in the company.

## IKEA

In *Public Prosecutor v Leng Kah Poh* [2014] SGCA 51 (the IKEA case), the Court of Appeal clarified that inducement by a third party was not necessary to establish a corruption charge under the PCA. In doing so, the Court of Appeal overturned an acquittal by the High Court of Leng Kah Poh, the former IKEA food and beverage manager in Singapore, who had originally been sentenced to 98 weeks of jail for 80 corruption charges. Leng had reportedly received a S\$2.4 million kickback for giving preference to a particular product supplier. The High Court had overruled the conviction of the trial court and acquitted Leng, holding that the conduct did not amount to corruption because he had not been induced by a third party to carry out the corrupt acts. The High Court held that an action for corruption would only succeed when there are at least three parties

- A principal incurring loss.
- An agent evincing corrupt intent.

- A third party inducing the agent to act dishonestly or unfaithfully.

The High Court held that in this case no third party existed and therefore the conduct alleged was not considered to amount to corruption under the PCA. However, in overturning the decision of the High Court, the Court of Appeal noted that if inducement by a third party were necessary, it would lead to absurd outcomes and undermine the entire object of the PCA.

## Seagate

In *Teo Chu Ha v Public Prosecutor* [2014] SGCA 45, a former director at Seagate Technology International (Seagate) received shares in a trucking company and subsequently assisted that company to secure contracts to provide trucking services for Seagate. The High Court held that the conduct did not amount to corruption, as the rewards were not given for the "purpose" or "reason" of inducement because they were not causally related to the assistance Teo had rendered. Furthermore, Teo had paid consideration for the shares. The Court of Appeal overruled the High Court decision, finding that a charge of corruption could still be made out when consideration was paid and it was not necessary to prove that consideration was inadequate or that the transaction was a sham. The Court of Appeal noted in particular that the purpose of the PCA would be undermined if it were interpreted to have such a narrow scope that could be circumvented by sophisticated schemes such as the one in the present case.

## City Harvest

In a high-profile case involving six leaders of a mega-church in Singapore, City Harvest Church, church founder Kong Hee and five leaders were found

guilty by the Singapore state courts of conspiring to misuse millions of dollars of church funds to further the music career of singer Sun Ho, who is also Kong's wife. The six had misused some S\$50 million in church building funds earmarked for building-related expenses or investments.

Five of the six, including Kong, were found guilty of misusing S\$24 million towards funding Ho's music career by funneling church funds into sham investments in a company controlled by Kong. Four of the six were also found guilty of misappropriating a further S\$26 million of church funds by falsifying accounts to cover up the first sum and defrauding the church's auditors. They were sentenced to jail terms ranging from 21 months to eight years. Both the prosecution and the respective accused persons have appealed against the judgment. The appeals were heard in September 2016 by a three-judge panel sitting in the High Court.

In April 2017, two out of three judges on the panel held that company directors or the equivalent such as the six accused persons, were not "agents" within the meaning of section 409 of the Penal Code, and substituted their convictions with the lesser charge of criminal breach of trust. Consequently, the jail terms of the six accused persons were significantly reduced to jail terms of between seven months and three and a half years.

Section 409 of the Penal Code is an aggravated form of criminal breach of trust, where stiffer sentences are meted out to persons who misappropriate property that have been entrusted to them in the way of their "business as a banker, a merchant, a factor, a broker, an attorney or an agent". The majority of the three-judge panel held that section 409 of the Penal Code only applies to "professional" agents, meaning those who offer their services

## Update and trends

In April 2017, the Standards, Productivity and Innovation Board (SPRING Singapore) and the Corrupt Practices Investigation Bureau (CPIB) launched the Singapore Standard (SS) ISO 37001: 2016 on Anti-bribery management systems.

Singapore participated in the ISO Working Group on Anti-Bribery Management Standards. In connection with the launch of SS ISO 37001: 2016, the CPIB also launched PACT: A Practical Anti-Corruption Guide for Businesses in Singapore, which aims to guide small and medium-sized enterprise owners in developing and implementing an anti-corruption framework.

The CPIB also released statistics on Singapore's corruption level. According to the CPIB, there was an 8 per cent decrease in complaints received in 2016 as compared with 2015. The CPIB also stated that even though only 7 per cent of the complaints registered in 2016 were lodged in person, such complaints accounted for a disproportionate number of cases investigated by the agency (26 per cent of all cases investigated). According to the CPIB, this was because the CPIB was able to obtain more detailed information on the suspected corrupt practices when reports are lodged in-person. In this connection, the CPIB also observed that private sector cases continued to form the majority (85 per cent) of all cases registered for investigation by the CPIB and that custodial sentences were meted out to the majority of private sector employees, demonstrating the uncompromising stance Singapore takes towards corruption, be it private or public in nature.

Separately, following the announcement that a Singapore-based-company entered into a global resolution with US, Brazilian and Singaporean authorities in connection with corrupt payments made to officials of Petrobras and other parties (see question 17), Singapore's minister for law and home affairs, Mr K Shanmugam, stated in a dialogue organized by the Law Society of Singapore in January 2018 that US-style deferred prosecution agreements (DPAs) could be formally introduced to Singapore as part of proposed legislative changes to Singapore's criminal justice system. He added that if implemented in Singapore, proposed terms under the DPAs will need to be approved by the Singapore High Court.

This formal DPA framework could potentially be introduced sometime in 2018 together with other proposed changes to Singapore's CPC and Evidence Act (Cap 97, 1997 Rev Ed).

as agents or make their living as agents, and that directors, such as the accused persons, cannot be considered "agents". This ruling is a significant break from a legal position that has prevailed in Singapore for the past 40 years and may have an impact on the interpretation of other similar provisions in the Penal Code and the PCA.

Shortly after the ruling, the prosecution filed a Criminal Reference with the Court of Appeal to clarify the point of law decided by the High Court. The hearing was heard on August 1, 2017. On February 1, 2018, a five-judge panel of the Court of Appeal rejected the prosecution's application to reinstate the original convictions of the six individuals.

## Clarence Chang

In March 2017, a former executive of an oil major, Clarence Chang Peng Hong, was charged with obtaining almost US\$4 million in bribes from the executive director of an oil trading firm, in order to advance the business interest of the firm with the oil major. The bribes were allegedly obtained on 19 occasions between July 2006 and March 2010. Chang also faced charges for corruptly converting property amounting to S\$3.97 million by using direct or indirect benefits of the corrupt conduct to acquire properties in Singapore.

In November 2017, a ship fuelling company and one of its directors were charged with offences involving the concealing of benefits from alleged criminal conduct. The company, that director and two others (another director and a bunker manager) were also charged with cheating. The offences related to an alleged scheme involving the company invoicing its customers for more marine fuel than that delivered. It is notable that a company has been charged for offences that involve concealing benefits accrued from alleged criminal conduct.

## SMRT Trains

In December 2017, three former and current employees of SMRT Trains, a rail operator in Singapore, were charged with cheating under the Penal Code for concealing their interests in two companies, which were awarded contracts worth almost 10 million Singapore dollars by SMRT Trains over a five-year period. The cases against the three accused persons are still pending.

Even though the conduct in question is more aligned to conflict of interests cases which have been prosecuted as corruption cases (see the *IKEA* case and *Seagate* case above), the *SMRT* case demonstrates that the authorities in Singapore may choose to prosecute individuals for cheating instead of corruption without having to prove that gratification had been offered, given or accepted.

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